

**RULES
OF
THE TENNESSEE DEPARTMENT OF HUMAN SERVICES
ADMINISTRATIVE PROCEDURES DIVISION**

**CHAPTER 1240-5-13
CHILD CARE AGENCY BOARD OF REVIEW**

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1240-5-13-.01 PURPOSE AND SCOPE.

- (1) These rules shall apply to the procedures of the Child Care Agency Board of Review for the determination of the status of licenses for the operation of child care agencies issued by either the Department of Children's Services pursuant to TCA §§ 37-5-501 et seq. or for the operation of a child care agency by the Department of Human Services pursuant to TCA §§ 71-3-501 et seq., and for determining the status of any civil penalties imposed by the Department of Human Services.
- (2) Any conflict between these rules and the rules governing the individual class of child care agency licensed by the Department of Children's Services or by the Department of Human Services shall be governed by these rules. Any conflicts between these rules and the licensing law are governed by the licensing law.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative History:** Original rule filed September 29, 2000; effective December 13, 2000.

1240-5-13-.02 DEFINITIONS.

- (1) Applicant-The person or entity seeking an initial annual license or the issuance or renewal of any annual or extended license from the Department of Children's Services or the Department of Human Services.
- (2) Application-The form for, and the process of, applying for a license from the Departments of Children's Services or Human Services.
- (3) Child care agency or agency -The person or entity providing child care as defined by the licensing law in TCA §§ 37-5-501 et seq. and 71-3-501 et seq. and the rules, respectively, of the Departments of Children's Services and Human Services.
- (4) Child Care Agency Board of Review, Board of Review or Board-The entity established by TCA §§ 71-3-510 and 37-5-515 to hear the appeals of the denial, revocation, or the restriction or limitation, other than summary suspensions, of licenses for child care agencies issued by the Departments of Children's Services and Human Services, and which adjudicates civil penalties imposed by the Department of Human Services against a child care agency under its jurisdiction.
- (5) Civil penalty- A financial sanction imposed by the Department of Human Services against a child care agency that has violated a licensing regulation.
- (6) Commissioner-The executive head of the Department of Children's Services or Human Services, as the context requires.
- (7) Denial-The decision of the Department not to issue a license.

(Rule 1240-5-13-.02, continued)

- (8) Department-As the context requires, the term “Department”, without further description, refers to either the Department of Children’s Services or the Department of Human Services and, in such case, is dependent upon which class of child care agency is under consideration by the Department with licensing authority over the child care agency or which class of child care agency governed by the applicable Department is under consideration by the Child Care Agency Board of Review.
- (9) Hearing Official-The administrative law judge or hearing officer assigned by law to conduct hearings before the Child Care Agency Board of Review.
- (10) Law-The statutory or regulatory provisions affecting the operation of a child care agency.
- (11) License- A permit issued by the Department of Children’s Services or the Department of Human Services to a child care agency, authorizing the licensee to provide child care in accordance with provisions of the license, the law, and the regulations of the Departments of Children’s Services or Human Services.
- (12) Probation-The process used by the Child Care Agency Board of Review or a panel of the Board as part of the hearing on an appeal by a child care agency to permit a child care agency to continue operation under conditions set by the Board or panel which may allow the Board to determine if the agency can provide adequate care for children under its supervision consistent with the licensing law and regulations governing that class of child care agency.
- (13) Licensee-The person, agency, group, or entity to whom or to which a license to operate a child care agency is issued by the Departments of Children’s Services or Human Services.
- (14) Reapplication-Application for a new license following denial or revocation of a license.
- (15) Restricted license-A license which, either at the time of issuance, or during the license’s existence, is reduced in its operational authority by the Departments of Children’s Services or Human Services so that the child care agency’s ability to provide certain child care related services is limited because the Department has determined that one or more areas of the agency’s operations are not in compliance with child care laws or regulations or the agency’s operations are, or have posed, a risk to the health, safety or welfare of children in the agency’s care or the agency’s operations pose the potential of such risk. A restricted license may also be imposed by the Child Care Agency Board of Review as part of its review of the licensing status of a child care agency in the same manner, and for the same reasons, as such a license is issued or imposed by either Department. A restricted license may be appealed to the Child Care Agency Board of Review.
- (16) Revocation-The permanent removal of an existing license.
- (17) Temporary license:
 - (a) A permit issued by the Department of Children’s Services or the Department of Human Services to a new child care agency allowing and authorizing the temporary licensee, unless otherwise prohibited by law, to begin child care operations while the agency attempts to attain full compliance with all other applicable regulations.
 - (b) The temporary license is valid, unless suspended, for ninety (90) days for a Department of Children’s Services temporary license, or one hundred twenty (120) days for a Department of Human Services temporary license or until the application for an annual license is finally determined, and is issued upon application or reapplication by the applicant only if the staff and facility do not present any apparent hazards to the children that may be in care and only if the facility has received fire safety and environmental sanitation approval and if the applicant and the personnel who will care for the children are capable in all substantial respects to care for the

(Rule 1240-5-13-.02, continued)

children and that the applicant has the ability and intent to comply with the licensing laws and regulations.

- (c) If, at the end of the ninety (90) or one hundred twenty (120) day period, evidence is provided by the applicant that such child care agency is suitable and properly managed and that the agency is in compliance with the rules governing the applicable class of child care agency, the Department will issue an annual license to the child care agency, unless the Department determines that a restricted license should be issued.
- (d) The denial of a temporary license may be appealed to the Board of Review as provided in this chapter.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative History:** Original rule filed September 29, 2000; effective December 13, 2000.

1240-5-13-.03 COMPOSITION AND DUTIES OF THE BOARD.

- (1) The Board membership shall be composed of the Commissioners of Health and Education or their designees, the Executive Director of the Commission on Children and Youth or designee, and a member from one (1) current or previous standards committee from the Departments of Children's Services and Human Services. Four (4) persons shall be selected from a pool of up to twelve (12) representatives at-large. These four (4) persons shall be selected by the five (5) members designated above as follows:
 - (a) Four (4) shall be selected to serve for one (1) year;
 - (b) Four (4) shall be selected to serve for two (2) years; and
 - (c) Four (4) shall be selected to serve for three (3) years.
 - (d) Thereafter, each at-large representative shall be selected to serve for terms of three (3) years or until his or her successor is selected.
- (2) In reviewing licensing actions under this Chapter, the Board of Review shall consist of nine (9) persons selected from the Board's membership.
- (3) A quorum of the Board shall consist of five (5) persons.
- (4) In establishing a quorum for the Board to conduct its review of the licensing actions of the Departments, the chair shall randomly select the names of the at-large members of the Board for the Board's current licensing review action from the pool of twelve (12) persons selected pursuant to paragraph (1) until the nine (9) member composition is reached, or, if that is not possible, until a quorum is reached.
- (5) Until a Chair is selected by the Board, the Commissioner of Education or the Commissioner's designee shall serve as the Chair of the Board. The Board shall elect a Vice-Chair who shall serve in the absence of the Chair. If the Chair resigns, is unable to perform the duties of the Chairperson, is removed or the Chair's term on the Board expires, the Commissioner of Education shall appoint a new Chair until the Board can elect a Chair. The Vice-Chair shall have authority to sign all orders of the Board in the absence or inability to act by the Chair, and can sign orders for actions of the panels pursuant to paragraph (6).
- (6) In order to complete the work of the Board, the Chair may appoint one or more panels of the Board with a quorum of five (5) members, at least two (2) of whom shall be randomly selected at-large members selected by the Chair. The Chair of the Board shall appoint the Chair of the panel. The panel

(Rule 1240-5-13-.03, continued)

shall have complete authority to hear any case under the Board's jurisdiction and shall have complete authority to enter any necessary orders concerning licensing actions conducted before the Board. Any orders of the panel shall be signed by the Chair of the panel, or in the absence or inability to act by the panel chair, by the Board Chair or Vice-Chair.

- (7) Consistent with the licensing laws and regulations governing the child care agency, it is the duty of the Board to impartially consider the status of the licenses of all child care agencies whose cases are presented to the Board.
- (8) In rendering its decisions, the Board, consistent with the provisions of paragraph (7), shall be guided at all times by the best interests of the children in the care of the child care agency.
- (9) The Board may receive legal advice on its operations and procedures from the Office of General Counsel of the Departments of Children's Services or Human Services, consistent with the provisions of TCA § 4-5-301 et seq.
- (10) The Board shall meet quarterly, and more often as necessitated by the Board's duties. It shall receive periodic training in its duties and procedures for the conduct of Board hearings from the program and legal staff of the Department of Human Services, in consultation and with the assistance of similar staff from the Department of Children's Services.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative History:** Original rule filed September 29, 2000; effective December 13, 2000.

1240-5-13-.04 RECORDING SECRETARY.

- (1) The Board shall have a Recording Secretary who shall be a member of the professional staff of the Department of Human Services based upon an inter-agency agreement between the Departments of Children's Services and Human Services. In the Recording Secretary's absence or inability to act, a member of the Department of Human Services' professional staff may carry out the Recording Secretary's duties.
- (2) The Recording Secretary shall be responsible for maintaining the records of the Board, setting hearings with the Administrative Procedures Division of the Secretary of State's Office, filing any necessary documents with the Administrative Procedures Division of the Secretary of State's Office involving the initiation of licensing actions before the Board by the Departments, arranging for the attendance of Board members at the hearings, arranging the facilities to conduct the hearings before the Board, arranging hearing dates with parties and notification of parties of the times, dates and places of hearings or any continuances or re-scheduling of hearings, and such other duties as may be necessary to accommodate the business of the Board.
- (3) Timely appeals received by the Commissioner's office or the Department's licensing director shall be sent within two (2) business days to the Recording Secretary. The Recording Secretary shall keep a log of all appeals and the date an appeal was received in the Recording Secretary's office.
- (4) Upon receipt of the timely filed appeal, the Recording Secretary will contact the Administrative Procedures Division of the Secretary of State's Office within one (1) business day to docket the appeal and to make any other arrangements for the hearing of the case. Within three (3) business days, the Recording Secretary will file a copy of the appeal request, and a copy of the notice of licensing action by the Department which resulted in the appeal, with the Administrative Procedure's Division of the Secretary of State's Office.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative History:** Original rule filed September 29, 2000; effective December 13, 2000.

1240-5-13-.05 HEARING PROCEDURES.**(1) Hearing Dates, Continuances and Substitute Administrative Law Judge.****(a) Hearing Date and Continuances.**

1. The hearing for a timely filed appeal regarding the denial, revocation, or other restriction or limitation of a child care agency license imposed by the Department, other than the summary suspension of the license or the placement of a child care agency on probation by the Department, shall be heard by the Board of Review within thirty (30) days of the date of service of the notice of denial, revocation, restriction or limitation, unless, for good cause, the hearing date is continued. Summary suspensions of licenses shall be heard as provided in the rules or procedures of the Department.
2. A hearing regarding the imposition of a civil penalty imposed by the Department of Human Services shall be heard within ninety (90) days of the notice of the penalty unless, for good cause shown, the hearing date is continued. The Department shall not attempt recovery of a civil penalty until the time for appeal has expired, or, if appealed, the appeal process before the Board, has been exhausted.
3. For good cause as stated in an order entered on the record, the Board or the Administrative Law Judge may continue a hearing. Prior to a case being heard by the Board, the Administrative Law Judge may issue a continuance order. In order to protect the children in the care of the agency from any risk posed to their health, safety and welfare, the Board or Administrative Law Judge shall re-set the hearing at the earliest date that circumstances permit.

(b) Substitute Administrative Law Judges.

1. Substitute Administrative Law Judges in Department of Human Services Cases.
 - (i) If the Administrative Procedures Division of the Office of the Secretary of State certifies by letter to the Recording Secretary of the Board that the Division's contested case docket prevents the scheduling of a hearing before the Board within the initial timeframes set forth in this chapter regarding the appeal of the denial or revocation, or restriction or other limitation of a license, other than a summary suspension of license, or for the review of a civil penalty imposed by the Department of Human Services, then the Department of Human Services shall have the authority to obtain an attorney who shall act as the Administrative Law Judge to conduct the proceedings before the Board. The substitute Administrative Law Judge may be obtained by contract with a private attorney or by contract or agreement with another state agency.
 - (ii) The substitute Administrative Law Judge shall have the same authority as an Administrative Law Judge of the Department of State. The hearing may be continued by order of the Board for the purpose of obtaining a substitute Administrative Law Judge. The continuance order in such case may be entered by the Board, the panel Chair, or the Vice-Chair of the Board.
2. Substitute Administrative Law Judges in Department of Children's Services Cases.
 - (i) If the Administrative Procedures Division of the Office of the Secretary of State certifies by letter to the Recording Secretary of the Board that the Division's contested case docket prevents the scheduling of a hearing before the Board within the initial timeframes set forth in this chapter regarding the appeal of the denial or

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revocation, or restriction or other limitation of a license, other than a summary suspension of license, then the Department of Children's Services shall have authority to appoint a Hearing Officer from the Department to conduct the proceedings before the Board.

- (ii) The substitute hearing officer shall have the same authority as an Administrative Law Judge of the Department of State. The hearing may be continued by order of the Board for the purpose of obtaining a substitute Hearing Officer. The continuance order in such case may be entered by the Board or panel chair of the Vice-Chair of the Board.
- (2) If timely appeal was made to the appropriate Department, then, pending the hearing upon the denial or revocation of a license, the child care agency may continue to operate prior to the decision of the Board or panel unless the license is summarily suspended as provided by the rules of the appropriate Department.
- (3) A summary suspension order entered by the appropriate Department may be lifted or modified by that Department following its entry by that Department before or after a case is docketed without further approval of the Board or panel.
- (4) After a case is docketed and prior to a hearing before the Board, any settlement or dismissal of the case involving the denial, revocation, restriction or other limitation of a license other than a summary suspension, or, any settlement or dismissal involving the imposition of a civil penalty by the Department of Human Services, shall be approved by an order of the Board Chair or panel Chair, or in the Chair's absence or inability to act, by the Vice-Chair of the Board, or, in the absence or inability to act by the panel Chair, then by the Board Chair or Vice-Chair. Prior to approval, the Chair or Vice-Chair shall poll members of the Board or panel to determine if there is agreement of the Board members regarding approval of the settlement or dismissal and the Recording Secretary or designee shall maintain a record of the discussion and vote as required by TCA §§ 4-5-312 and 4-5-319.
- (5) Hearing procedures.
 - (a) Hearings shall be conducted pursuant to the provisions of the Administrative Procedures Act in Title 4, Chapter 5, Part 3, of the Tennessee Code Annotated, and a record of the proceedings shall be maintained as required by TCA § 4-5-319.
 - (b) Any party may be represented by counsel of the party's choice.
 - (c) Hearing testimony may be taken by telephone in a manner that allows all parties present to hear the testimony, if approved by the hearing official.
 - (d) Decisions of the Board shall be based upon a majority vote of the Board or panel members present and shall be based upon a preponderance of the evidence. The decisions shall be based upon a consideration of the seriousness of the violations of the licensing regulations by the child care agency, the effect of the violations on the care of children by the child care agency, the relevant history of violations of licensing regulations by the agency and the relevant history of the agency's ability to maintain compliance, the corrective measures taken by the child care agency to remedy the violations, and the willingness and ability of the licensee to correct any violations or to maintain compliance with the Department's regulations.
 - (e) Content of Board Orders, Entry, Filing and Record of Board Orders.
 - 1. An order of the Board or panel shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness of the Board's or

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- panel's order. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings, and a reference, if appropriate, to the exhibits entered in the case.
2. The final order, initial order or decision must also include a statement of the available procedures and the time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order. An initial order or decision shall include a statement of any circumstances under which the initial order or decision may, without further notice, become a final order.
 3. Any orders resulting from hearings before the Board or a panel of the Board shall be prepared by the party designated by the Board or panel and shall be signed by the Board or panel Chair, or Vice-Chair of the Board in the absence or inability of the Board Chair to act, or by the Board Chair or Vice-Chair in the absence or inability of the panel Chair to act. The orders shall be delivered to the Recording Secretary following signature and shall be filed by the Recording Secretary with the Administrative Procedures Division of the Office of the Secretary of State within five (5) business days following signature by the appropriate Chair. Copies of the signed orders shall be provided by the Recording Secretary to all parties.
 4. The Recording Secretary shall maintain copies of all orders in the records of the Board.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative History:** Original rule filed September 29, 2000; effective December 13, 2000.

1240-5-13-.06 BOARD PROBATION AND RESTRICTED LICENSES.

- (1) The Board or panel, as part of its decision regarding the status of the license, may direct that the child care agency be allowed to operate on a probationary or conditional status, and may grant or continue the license with any restrictions or conditions on the agency's authority to provide care.
- (2) Such restrictions or conditions on the agency's authority to provide care may include, but are not limited to, limitations on the agency's ability to provide transportation or food service, enrollment of the children at the agency, the agency's hours of operation, the agency's use of certain parts of the agency's physical facilities or any other function of the child care agency that the Board or panel determines should be restricted or modified in order to protect the children in the care of the agency.
- (3) The specific limitations shall be set forth in the Board's or panel's order.
- (4) No probationary or conditional status may be continued for more than six (6) months without further review by the Board or panel.
- (5) If the Board or panel issues a restricted or conditional license containing limits or conditions for the agency's operations, the licensee may seek removal of the restrictions. If satisfied that circumstances no longer warrant further restrictions or conditions on the license, the Board may remove any or all of the restrictions or conditions. The Board or panel may, at anytime, modify or remove the restrictions on the license.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative History:** Original rule filed September 29, 2000; effective December 13, 2000.

1240-5-13-.07 WAIVER OF REAPPLICATION WAITING PERIODS.

- (1) A licensee may request from the Board at a hearing on a denial or revocation of the agency's license a waiver of the re-application waiting period set forth in TCA §§ 37-5-514(f) and 71-3-509(g) for first and second denials or revocations of licenses. A former licensee may also request a separate subsequent hearing before the Board or a panel in a written request made to the Commissioner for such a hearing. The Commissioner may elect to conduct this review.
- (2) No waiver may be requested by the licensee or granted by the Board or a panel, or by the Commissioner, following a third denial or revocation of the agency's license.
- (3) The agency must show to the Child Care Agency Board of Review's or the Commissioner's satisfaction, by a preponderance of the evidence, that the agency has corrected the deficiencies which led to the denial or revocation, and that the child care agency can demonstrate that it has the present and future ability, and is willing, to maintain compliance with licensing laws or regulations.
- (4) The decision of the Board or panel, or the Commissioner, shall be reduced to an order, which shall be a final order pursuant to Title 4, Chapter 5, Part 3, and may be appealed pursuant to § TCA 4-5-322.

Authority: TCA §§ 4-5-201 et seq.; 71-1-105; 71-3-501 et seq.; Acts 2000, ch. 981, §§ 11 and 14. **Administrative**

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